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Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

In the Matter of **Distribution of the** **2014-17 Satellite Funds**	)	**Docket No. 16-CRB-0010-SD (2014-17)**

PROGRAM SUPPLIERS' BRIEF REGARDING PROPOSED CLAIMANT GROUP DEFINITIONS

Pursuant to the Copyright Royalty Judges' ("Judges") *Notice Of Participants And Order For Preliminary Action To Address Categories Of Claims* (March 20, 2019) ("Notice"), the Motion Picture Association of America, Inc. ("MPAA"), its member companies and other producers and distributors of syndicated series, movies, specials, and non-live team sports broadcast by television stations and retransmitted by satellite systems who have agreed to representation by MPAA ("Program Suppliers"), hereby submit their brief regarding proposed claimant category definitions for the Allocation Phase of this proceeding ("Claimant Group Definitions").

Program Suppliers' address two major issues here. *First,* they address the appropriate scope of the Claimant Group Definitions that should be adopted by the Judges under the Copyright Act. *Second,* they propose clarifications to the Claimant Group Definitions that were adopted by the Judges in the recent 2010-13 Satellite Allocation Proceeding in order to eliminate ambiguity. Program Suppliers attach a redline showing proposed clarifications to the Claimant Group Definitions as Appendix A.

INTRODUCTION

In the *Notice*, the Judges appear to use the terms "claimant categories" and "program categories" interchangeably.[1] However, based on historical understanding and practice, these terms are distinct. The term "claimant categories" refers to individuals or groups of eligible claimants that coalesce under one of the eight parties that appear in Allocation Phase proceedings before the Judges ("Claimant Groups"). These Claimant Groups are defined by the particular types of eligible works, or "program categories" they represent as determined by the claims filed by the claimants who comprise the particular Claimant Group ("Program Types"). Claimant Groups can include (and, indeed, have always included) more than one Program Type. For example, the Program Suppliers Claimant Group represents copyright owners of movies, syndicated series, specials, and non-live team sports programs. Thus, the Program Suppliers Claimant Group represents the interests of copyright owners of works falling within *four* different Program Types.

The Judges have expressed their intention to "formalize definitions of *claimant categories* for the purpose of initial allocation of funds" in this proceeding. *Notice* at 2 (emphasis added). If the Judges intend to retain Claimant Group Definitions for this proceeding that encompass multiple Program Types, as they have in past Allocation Phase proceedings, it is Program Suppliers' position that no additional categories are needed and the existing Claimant Groups can be retained with modest adjustments, as set forth in Appendix A. However, if the Judges decide to deviate from past practice and limit each Claimant Group Definition to a single Program Type, Program Suppliers reserve the right to request that additional categories be established so that each of the

[1] *Compare Notice* at 2 ("The Judges hereby give notice of their intent to formalize definitions of *claimant categories* for the purposes of initial allocation of funds[.]") *with Notice* at 2 (referencing "the procedure and timeline for participants wishing to be heard on the issue of *program categories*"); *see also Notice* at Exhibit B (requesting briefing "regarding proposed *claimant category* definitions" and the "appropriateness of previously used *program category* definitions.") (Emphases added). In order to avoid confusion, Program Suppliers will use the terms "Claimant Groups" and "Program Types" in this pleading.

four separate Program Types represented by claimants within the Program Suppliers Claimant Group are fully captured.[2]

ARGUMENT

I. The Copyright Act Requires The Judges To Adopt Claimant Group Definitions Limited To Eligible Claimants, And Their Associated Eligible Works.

The Judges must ensure that the scope of the Claimant Group Definitions adopted in this proceeding are consistent with the eligibility requirements for claiming and receiving statutory license royalties set forth in the Copyright Act. Thus, it is necessary for the Judges to consider the appropriate scope of the Claimant Group Definitions for this proceeding and address that issue in conjunction with their adoption.

A. The Copyright Act Limits Royalty Distributions To Eligible Claimants And Eligible Retransmitted Works

Section 119 of the Copyright Act permits distribution of satellite statutory license royalties only to copyright owners or their authorized representatives who have (1) filed valid claims for such royalties,[3] and (2) demonstrated that they are copyright owners of eligible retransmitted works entitled to receive such royalties.[4] These threshold eligibility requirements

[2] If the Judges decide to change course and adopt Program Type Definitions instead of Claimant Group Definitions, Program Suppliers respectfully request an opportunity to provide additional briefing proposing a set of Program Type Definitions, in lieu of the Claimant Group Definitions set forth in Appendix A.

[3] *See* 17 U.S.C. § 119(b)(3); § 803; 37 C.F.R. § 351.1(b)(3); *see also Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64984, 64987 (Oct. 30, 2013) (citing *Universal City Studios LLLP v. Peters*, 402 F.3d at 1235, 1244 (D.C. Cir. 2005)); *Order Denying Motions To Strike Claims*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 2 (Sept. 14, 2012); *see also Order On Joint Sports Claimants' Motion For Summary Adjudication Dismissing Claims Of Independent Producers Group,* Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 4 (Aug. 29, 2014).

[4] The works eligible for royalty compensation in this proceeding are those works that were the subject of secondary transmissions by satellite operators during the relevant time period. *See* 17 U.S.C. § 119(b)(3); *see also* Order in Docket No. 2000-2 CARP CD 93-97 at 6 (June 22, 2000) ("The law is clear that only those parties whose works were the subject of secondary retransmissions are entitled to a distribution of royalties, and it is only those parties on whose behalf a claim may be filed.") ("June 22, 2000 Order"); 59 Fed. Reg. 63025, 63029 (December 7, 1994) ("We agree with NAB that…the Copyright Act authorizes distribution of cable royalties only to copyright owners whose works were retransmitted on a distant signal.").

are statutory in nature, and cannot be waived. *See* June 22, 2000 Order at 8 (acknowledging that the Copyright Office may not waive statutory eligibility requirements); *see also Universal City Studios,* 402 F.3d at 1244 (holding that claimants seeking a share of statutory license royalties "are entitled…to nothing if they do not meet the terms of eligibility under the statute and its implementing regulations"); *Christian Broadcast Network v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1313 (D.C. Cir. 1983) ("the Act envisions the need for copyright holders to qualify for distribution of the Fund"); *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 380 (D.C. Cir. 1982) (holding that the Act "requires that the Fund be distributed 'among' designated copyright owners, and makes it clear that royalty recipients must qualify under the terms of that section.").

In the 2010-13 Satellite Allocation Phase Proceeding, the Judges adopted claimant category definitions proposed by the Allocation Phase Parties based on the parties' representation that the proposed categories and definitions "are mutually exclusive and cover all eligible works on distant signals." *See Order Regarding Discovery*, Docket No. 14-CRB-0011-SD (2010-13) at 1 (July 21, 2016) ("Satellite Order"); *see also Order Regarding Discovery,* Docket No. 14-CRB-0010-CD (2010-13) at 4 (July 21, 2016) (citing *Joint Comments of 2010-13 Cable Participants On Phase I Claimant Category Definitions* at 2 (October 9, 2015)) ("Cable Order"). The Judges further clarified that they construed the phrase "cover all eligible works" as "meaning that 'all' works in [each] category would be 'eligible copyrighted works,'" and that it would not be reasonable for the Judges to construe the phrase as permitting the claimant categories to include both eligible and ineligible works. *See* Cable Order at 5, n.9. The Judges should follow the same logic here and make it clear that the Claimant Group Definitions adopted for this proceeding are both mutually exclusive and limited to eligible copyrighted works.

B. "Unclaimed" Works Are Not Eligible Works.

The Copyright Act does not permit any party to these proceedings to receive statutory license royalties for works that are not associated with a timely, valid royalty claim. *See* 17 U.S.C. § 119(b)(3); *see also Universal City Studios*, 402 F.3d at 1244. Indeed, the Judges have routinely dismissed entities (and all their associated works) from royalty distribution proceedings because they failed to file a timely, valid claim.[5] Accordingly, works that were distantly retransmitted by satellite systems during the royalty years at issue in this proceeding, but which are not associated with a timely, valid royalty claim are "unclaimed works," and are ineligible to receive statutory license royalties in these proceedings. It follows that the Claimant Group Definitions adopted by the Judges for this proceeding should also be limited to eligible works and must expressly *exclude* unclaimed works.

Program Suppliers anticipate that some parties to this proceeding may suggest that the Judges should allow unclaimed works to be included in the Program Type descriptions associated with Claimant Group Definitions based on a nearly forty-year-old ruling made by the Copyright Royalty Tribunal ("CRT") in the 1978 Cable Royalty Proceeding.[6] However, that dated CRT ruling is inconsistent with the Judges' more recent rulings addressing eligibility issues, as it allows Allocation Phase Claimant Groups to improperly inflate their Allocation Phase claims with ineligible works, thereby diverting statutory license royalties from eligible

[5] *See, e.g., Memorandum Opinion And Ruling On Validity And Categorization Of Claims*, Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 33 (March 13, 2015) (recognizing that "Sections 111 and 119 of the Act only allow copyright owners for whom claims have been timely filed to collect retransmission royalties," and dismissing 57 separate entities for failure to file a claim).

[6] *See* 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63042 (Sept. 23, 1980) (ruling (1) that allocations to the Phase I claimant categories would presume that all eligible claimants in each program category had filed valid claims; (2) that royalty fees would be allocated to categories of claimants as if all eligible claimants in each category had filed valid claims; and (3) that the share for each individual claimant in a category will be determined by voluntary agreement or a Phase II decision).

claimants in other Allocation Phase Claimant Groups. Moreover, the CRT expressly recognized that its decision was non-precedential for future proceedings, making it clear that its "disposition of the unclaimed royalty issue in this proceeding may not necessarily control any subsequent distribution proceeding." *See id.* Accordingly, although the Judges are required to act "on the basis" of prior rulings by their predecessor tribunals, *see* 17 U.S.C. § 803(a)(1), no precedent binds the Judges to follow such a practice in this proceeding. Program Suppliers urge the Judges to adopt Claimant Group Definitions for this proceeding that are limited to eligible works, and that expressly exclude unclaimed works, as required by the Copyright Act.

C. Opposing Parties Must Be Afforded An Opportunity To Test Whether Allocation Phase Claims Are Limited To Eligible Claimants And Works.

The Judges have ruled that all opposing parties in proceedings before the Judges are entitled to seek full discovery, including inter-category discovery, to allow parties to test the validity of methodologies presented in these proceedings. *See Amended Joint Order On Discovery Motions,* Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 4-10 (July 30, 2014). If the Judges adopt Claimant Group Definitions that are limited to eligible works, and which expressly exclude unclaimed works, then all participants should be afforded an opportunity to conduct inter-Claimant Group Allocation Phase discovery to enable them to test whether the Allocation Phase methodologies presented by the Claimant Group representatives are properly limited to eligible works, especially given that there are no express or implied agreements among the participants in this proceeding regarding the disposition of eligibility issues.[7] Accordingly, the Judges should clarify that inter-Claimant

[7] In the 2010-13 Satellite Allocation Phase Proceeding, Program Suppliers sought inter-category discovery from the other Allocation Phase Parties regarding eligibility issues in order to test whether any claimant category was bloating its Allocation Phase claims with ineligible (or miscategorized) works. The Judges denied Program Suppliers this inter-category Allocation Phase discovery, ruling that by submitting Joint Comments addressing the

Group discovery is appropriate regarding such eligibility issues as a part of their ruling adopting the Claimant Group Definitions.

II. The Claimant Group Definitions Used In Past Proceedings Should Be Clarified.

Program Suppliers propose clarifications to the Claimant Group Definitions adopted by the Judges in the 2010-13 Satellite Allocation Phase Proceeding in order to promote clarity and eliminate any ambiguity regarding which of the Claimant Group Definitions include sports programming, and, in particular, non-live-team sports programming.

The Program Suppliers Claimant Group claims non-live-team sports programs that were distantly retransmitted by satellite systems during the 2014-2017 satellite royalty years. To provide further context, some representative examples of the non-live-team sports programs that fall within the Program Suppliers Claimant Group's claim in this proceeding are

- Automobile racing programs, including NASCAR 2015: A NEW ERA (claimed by NASCAR Media Group);
- Sports-related programs such as NFL HONORS (claimed by NFL Films), NBA COUNTDOWN (claimed by National Basketball Association); and BEST OF COLLEGE FOOTBALL 2015 (claimed by Intersport);
- Pre-game and post-game programs such as SOCCER POSTGAME and PREMIER LEAGUE GOAL ZONE (claimed by Major League Soccer, LLC);
- Other sports programs such as RUNNING: NEW YORK CITY MARATHON (claimed by New York Road Runners, Inc.), SWIMMING: U.S. NATIONAL CHAMPIONSHIPS (claimed by U.S. Swimming, Inc.), GOLF: PNC FATHER/SON CHALLENGE (claimed by PGA Tour, Inc.), MASTERS TOURNAMENT HIGHLIGHTS (claimed by Augusta National Golf Club), SKIING: USSA FREESTYLE CUP (claimed by U.S. Ski & Snowboard Association); and ISU GRAND PRIX FINAL (claimed by U.S. Figure Skating Association).

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claimant categories with the other Allocation Phase Parties, Program Suppliers had "effectively agreed that in the allocation phase of [the 2010-13 Satellite] proceeding (as in all previous Phase I proceedings) the decision as to eligibility of claims shall be made—indeed has been made—*by each category representative*." *See* Cable Order at 5; *see also* Satellite Order at 1 (adopting the reasoning in the Cable Order). Program Suppliers have entered into no such agreement, effective or otherwise, in the instant proceeding.

The foregoing examples identified above are but a small slice of the many entities identified in Program Suppliers' Petition to Participate in this proceeding that maintain claims for non-live-team sports programs. Moreover, the Program Suppliers Claimant Group has consistently claimed the vast majority of non-live-team sports programs. For example, in the 2010-13 Cable Allocation Phase Proceeding, non-live-team sports programs falling within the Program Suppliers category averaged 1,451,808 unweighted distantly retransmitted minutes per royalty year. By contrast, the Joint Sports Claimants category averaged only 3,665,435 unweighted distantly retransmitted minutes per royalty year.[8] Non-live-team sports also received a substantial allocation by respondents to the Horowitz Surveys submitted in that proceeding, averaging approximately 8.5% of the total value allocated by cable system operators responding to the Horowitz Surveys during 2010-13.[9]

Program Suppliers acknowledge that the Commercial Television Claimants Claimant Group has historically included a very small number of station-produced, non-live-team sports programs (such as station-produced coverage of high school football games) that have not been categorized within the Joint Sports Claimants Claimant Group.[10] Therefore, Program Suppliers are proposing conforming clarifications to the Commercial Television Claimants and the Joint Sports Claimants Claimant Group Definitions to address this issue and eliminate ambiguity. Program Suppliers are also proposing additional clarifying edits to the Program Suppliers Claimant

[8] *See* Exhibit 6037, Written Rebuttal Testimony Of Jeffrey S. Gray, Docket No. 14-CRB-0010-CD (2010-13) at 26.

[9] *See* Exhibit 6012, Written Direct Testimony of Howard Horowitz, Docket No. 14-CRB-0010-CD (2010-13) at 16.

[10] In the 2010-13 Cable Allocation Phase Proceeding, the Judges recognized that the non-JSC sports programs valued by Horowitz Survey respondents could only be categorized as falling within the Program Suppliers and Commercial Television Claimants categories. *See* 84 Fed. Reg. 3552, 3585, n.117 (February 12, 2019). Program Suppliers respectfully disagree with the Judges' reallocation of the "Other Sports" points in the Horowitz Survey among all Claimant Groups, 84 Fed. Reg. at 3591, because such an allocation is inconsistent with the Claimant Group Definitions that were adopted by the Judges in that proceeding.

Group Definition to remove a reference to a program that no longer airs ("PM Magazine"), and to improve overall consistency. A redline capturing all of Program Suppliers' proposed clarifications is attached to this pleading as Appendix A.

CONCLUSION

For all of the foregoing reasons, Program Suppliers' proposals regarding the scope and language of Claimant Group Definitions should be adopted by the Judges for this proceeding.

Respectfully submitted,

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Dated: April 19, 2019

APPENDIX A

Redline Showing Proposed Clarifications To Allocation Phase Claimant Group Definitions

Allocation Phase Claimant Group	Eligible Program Types[11]
"Commercial Television Claimants."	Programs produced by or for a U.S. commercial television station and broadcast only by that station during the calendar year in question, including sports programs, except those programs that fall within the program types for the following claimant groups: ~~listed in subpart (3) of the~~ Program Suppliers or Joint Sports Claimants~~category~~.
"Devotional Claimants."	Syndicated programs of a primarily religious theme, but not limited to programs produced by or for religious institutions.
"Joint Sports Claimants."	Live telecasts of professional and college team sports broadcast by U.S. television stations, except those sports programs that fall within ~~program types claimed byin~~ the program types for the following claimant groups: ~~that fall within program types claimed byin the~~Commercial Television Claimants or Program Suppliers~~category~~.
"Music Claimants."	Musical works performed during programs that fall within the program types ~~are in~~for~~are in the following categories~~ the following claimant groups: Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, and Devotional Claimants.
"Program Suppliers."	Syndicated series, specials, and movies, except those programs that fall within ~~program types claimed byincluded in~~ the

[11] "Eligible" programs are programs that are eligible to claim and receive royalties under 17 U.S.C. § 119 and the Copyright Royalty Judges' regulations.

	Devotional Claimants program types ~~category~~; and sports programs, except those programs that fall within program types ~~claimed by~~for the Commercial Television Claimants or Joint Sports claimants groups~~Claimants~~. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. commercial television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music videos, cartoons, ~~"PM Magazine,~~ and locally-hosted movies.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2019, a copy of the foregoing pleading was provided to each of the parties on the attached service list, either electronically via the Copyright Royalty Judges' eCRB electronic filing system, or, for those parties not receiving service through eCRB, by Federal Express overnight mail.

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Proof of Delivery

I hereby certify that on Friday, April 19, 2019 I provided a true and correct copy of the Program Suppliers' BRIEF REGARDING PROPOSED CLAIMANT GROUP DEFINITIONS to the following:

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